UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

NEW FLYER USA Employer and TODD BENEDICT BRZINSKI Petitioner and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC Union	Case 18-RD-2455

DECISION AND ORDER

Petitioner seeks to decertify the Union in a unit of the Employer's production, maintenance, and warehouse employees employed at or out of its St. Cloud, Minnesota facility. The Union, however, contends that the Employer's May 11, 2002 voluntary recognition of the Union bars the petition as a reasonable period of time for bargaining between the Employer and Union had not elapsed at the time Petitioner filed his Petition. The Employer took no position on the issues, but rather intends to defer to the Board's ruling.

After reviewing the record, I conclude that a reasonable period of time for bargaining had not elapsed between the Employer's voluntary recognition of the Union and the filing of the petition on April 11, 2003 and, therefore, the petition should be dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. In order to understand my conclusions, I will first summarize the record regarding the Employer's operations and the existing collective bargaining relationship between the parties. In the second section of this decision, I will review the record and explain my conclusions regarding the recognition bar.

[1] The Employer, New Flyer USA, is a Minnesota corporation engaged in the manufacture and sale of transit buses at its St. Cloud, Minnesota facility. During the past calendar year, a representative period, the Employer derived gross revenues in excess of $500,000 and purchased and received at its St. Cloud, Minnesota facility goods valued in excess of $50,000 directly from suppliers located outside the State of Minnesota.

I. BACKGROUND

A. The Employer's Operations

The Employer manufactures transit buses. It has operations in both Crookston and St. Cloud, Minnesota. The plant in Crookston, approximately 4½ hours away from St. Cloud, has been operating for over ten years and the St. Cloud plant has been in existence for about four years. Although buses are manufactured at both plants, the manufacturing process is much more extensive at the St. Cloud facility. A plant the Employer has in Canada supplies parts for both the Crookston and St. Cloud facilities. However, the Crookston facility uses pre-assembled chassis and the buses are then built on them. In contrast, the entire bus, including the chassis, is built and assembled at the St. Cloud facility. The two plants have separate human resources departments.

B. History of the Collective Bargaining Relationship Between the Union and the Employer

The Union has represented the Employer's Crookston employees for approximately 10 years. During the most recent negotiations for a successor contract, the parties reached impasse, but with the assistance of Federal Mediation Commissioner Rosario, they were able to overcome impasse and reach an agreement

Pursuant to a neutral card check[2] with an FMCS observer, the Employer signed a card check recognition document recognizing the Union as the collective-bargaining representative of its St. Cloud production, maintenance, and warehouse employees on May 11, 2002. Shortly thereafter, the Union contacted John Reynolds, the Employer's

[2] Union representative Alan Piker testified that the Union presented 175 cards of the approximately 318 employees in the unit.

general manager,[3] by letter dated May 14 requesting information as to who the Employer's contact would be for bargaining. The Employer's attorney responded to the Union's letter on May 22 indicating that she would be the key contact for bargaining. On June 7, the Union sent another letter to the Employer suggesting dates to meet in July and August. Union representative Piker testified that the parties were not able to meet until August 21 due to the intervening departure of General Manager Reynolds and the Employer's search for a replacement. While the Employer was conducting its search for a new general manager, the Union held four information meetings with the employees and selected its bargaining committee members.

On August 21, the parties met for an eight-hour preliminary session to discuss the details of bargaining. During this meeting, the parties reviewed the Crookston and St. Cloud operations and noted their similarities and differences. Union representative Piker testified that on this occasion and throughout the negotiations the Employer insisted that because of the differences in operations the Employer was unwilling to "rubber stamp" the Crookston contract; and that because the Crookston contract had been negotiated over a number of years the Employer was unwilling to include all of its provisions in the initial St. Cloud contract. The parties also discussed future dates for bargaining. Although the Union was available to meet in September, the Employer was not.[4] Both parties were available to meet on various dates in October.

The parties began bargaining in earnest on October 15. Extensive bargaining sessions were held on October 15, 16, 21, 22, 30, 31, and November 1. Union

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3 Mr. Reynolds is also referred to in the record as district manager.

4 In a letter dated August 26, Employer's counsel notes "September is a very busy month for everyone." (U Ex. 9)

representative Piker testified that the first four of these sessions "were all about eight hour days" and that "October 30 through November 1st grew progressively longer in an attempt to get a contract." Shortly after midnight on November 2, the parties reached a tentative agreement. The proposed contract was presented to bargaining unit employees for a ratification vote on November 4, but it was rejected by a vote of 211 to 66. Ten days later, at the regularly-scheduled monthly informational meeting, the Union discussed with the membership their reasons for rejecting the contract. The employees identified wages, contract duration, and mandated overtime as their main issues with the proposed contract.

After meeting with the employees, the Union contacted the Employer to schedule more negotiation sessions, but was informed that the Employer was not ready to meet with the Union with so many issues on the table and suggested that the Union committee meet with Commissioner Rosario to narrow the issues and develop a plan for negotiations. The Union did contact Commissioner Rosario and met with him on his first available date of January 22, 2003. Unfortunately, Commissioner Rosario was not available again until March 11 due to scheduling conflicts and a six-week leave. The Employer agreed to the bargaining date of March 11.

At the end of February, Commissioner Rosario contacted the parties to cancel the March 11 date as a conflict with a national issue came up. Initially, the Union sought alternate dates and when none were available, asked for another FMCS mediator to attend the March 11 session. The Employer, however, wished to reschedule with Commissioner Rosario since he was familiar with the negotiations so far and had a particular expertise with the parties' history. The Union agreed and the parties were

able to schedule a March 31 date for bargaining, the first date Commissioner Rosario and the parties were all available.

On March 31, with the assistance of Commissioner Rosario, the parties met for the first time since the membership's rejection of the previous agreement. At this session, the parties reached an agreement that added significant wage increases to those agreed to the prior November: the first year of the agreement went from zero percent to three percent, and wage rates for each succeeding year of the five-year agreement were raised an additional one percent. The parties also agreed to modify the mandated overtime provision by adding a notification procedure. At the conclusion of the meeting, the negotiating committees for both parties signed a handwritten document that incorporated by reference the terms agreed to prior to March 31 and that set forth the new terms agreed to on that day. The entire collective bargaining agreement was expressly "conditioned upon ratification."[5] A ratification meeting was subsequently set for April 12.

The Union discussed the new agreement with employees at a regularly-scheduled informational meeting on April 10. An employee requested that they be permitted to vote on the agreement at this meeting rather than wait until April 12 to avoid a second trip for employees on Saturday. The Union agreed to this request. The record does not disclose how many employees actually voted on April 10. The Petitioner introduced

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5 At the hearing, the Union also raised contract bar as a basis for dismissing the petition, contending that the March 31 tentative agreement executed by the Employer and Union barred the petition. In its post-hearing brief, the Union concedes there is no contract bar as the March 31 agreement expressly stated that it was contingent on ratification. It appears that the Union's concession is correct. *See* Appalachian Shale Products Co., 121 NLRB 1160, 1163 (1958) ("[w]here ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as bar a unless it is ratified prior to the filing of the petition."); Merico, Inc., 207 NLRB 101 (1973).

testimony to the effect that there was discussion at this meeting about a decertification petition being circulated.

Union representative Piker testified that the Union scheduled the ratification vote for April 12 because the Employer needed time to print the agreement; and, since this was the first agreement for the St. Cloud facility, the Union wanted employees to be able to read the agreement before the ratification meeting. On April 12, the membership ratified the tentative agreement by a vote of 112 to 69. Only members were permitted to vote. All employees were offered the opportunity to execute membership cards and to do so without any attendant cost. Since the ratification, the Employer has implemented the terms of the parties' agreement.

II. ANALYSIS OF RECOGNITION BAR

In Sound Contractors, 162 NLRB 364 (1966), the Board concluded that in the context of representation cases an employer's lawful voluntary recognition of a majority union will serve as a bar to a petition challenging the union's representational status for a reasonable period of time following the recognition. Unlike the successorship situation, where employees have already had an opportunity to assess a union's effectiveness, employees in a situation involving voluntary recognition or certification need an opportunity to assess the union's effectiveness in an environment free from any attempts to replace, decertify, or otherwise alter the employer-employee relationship. Landmark International Trucks, Inc. v. NLRB**,** 699 F.2d 815, 818 (6th Cir. 1983), cited with approval in MV Transportation, 337 NLRB No. 129, slip op. at 2 (2002). In deciding recognition bar cases, "the Board seeks to balance the competing interests of effectuating employee free choice, while promoting voluntary recognition and protecting

the stability of the collective-bargaining relationship." Ford Center for the Performing Arts, 328 NLRB 1 (1999), citing Smith's Food & Drug Centers, 320 NLRB 844, 846 (1996).

Petitioner contends that the initial five-month delay prior to the parties commencement of bargaining was unreasonable and that a sufficient period of time for bargaining had elapsed in the eleven-month period between the Union's recognition and the filing of the petition to allow a decertification election. Contrary to Petitioner, the Union contends that a reasonable time had not passed at the time the petition was filed.

In analyzing what constitutes a "reasonable time," the Board has stated that it "is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions." Ford Center, 328 NLRB at 1. In determining whether a reasonable time has passed, the Board examines the factual circumstances unique to the parties' recognition and bargaining to determine whether, under the circumstances, the parties have had sufficient time to reach agreement. In doing so, the Board looks to: (1) the degree of progress made in negotiations, (2) whether or not the parties were at an impasse, and (3) whether the parties were negotiating for an initial contract. MGM Grand Hotel, Inc., 329 NLRB 464, 466 (1999).

Looking first to the degree of progress made in negotiations, I recognize that the parties did not actually begin bargaining in earnest until five months after the Union's recognition, but I do not find the initial delay dispositive. The record indicates that the delay was not attributable to difficulties in bargaining, but rather to the Employer's search for a new general manager and scheduling difficulties. *See* Ford Center 328 NLRB at 2, n. 4. Similarly, I do not find the fact that it took the parties nearly eleven

months from the date of the Union's recognition to reach a tentative agreement as dispositive of a reasonable time. As the Board stated in Ford Center, whether or not a reasonable period of time has passed "is not measured by the number of days or months spent in bargaining," but by the progress of the bargaining. 382 NLRB at 1. Although they were plagued by several scheduling difficulties, the bargaining sessions were productive leading to the first proposed contract in November. After the first proposed contract was rejected by the membership, the parties continued to move forward by bringing in a mediator to assist the bargaining committees individually to narrow issues and collectively in their next and final bargaining session on March 31, where they reached a tentative agreement. The progress in negotiations, culminating in a complete final agreement on the verge of ratification, is strong evidence that a reasonable time had not elapsed at the time of the filing of the petition.

The second factor considered by the Board in determining whether a reasonable time had elapsed is whether the parties reached impasse. Here, the parties did not reach impasse, despite the rejection of the first proposed contract. At all times the parties were moving forward in their negotiations and after the rejection of the first proposed contract, even brought in a mediator to assist them in reaching a complete final agreement.

Finally, the Board considers whether the parties are bargaining for an initial contract in evaluating whether a reasonable time has passed. The Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits where parties are negotiating a first contract. Ford Center, 328 NLRB at 2 *citing* N.J. MacDonald & Sons, Inc., 155 NLRB 67, 71-72 (1965). Here the parties were

negotiating a first contract for the St. Cloud employees. While it is true that the parties have a bargaining history regarding the Crookston plant, at the outset of the St. Cloud negotiations, the Employer emphasized that it was unwilling to simply "rubber stamp" the Crookston contract. To that end, the parties spent an eight-hour preliminary session on August 21 establishing the procedures for this negotiation and discussing the differences between the two plants. And, in fact, it appears that the final St. Cloud agreement and the Crookston contracts have substantial differences, including different starting wage rates; different provisions for jury duty (15 days in St Cloud, no limit in Crookston); sick leave (no allowance in St. Cloud, 4 days in Crookston); mandated overtime (St. Cloud requires notification by noon for weekdays and 48 hours notice for weekends, Crookston has not mandated overtime on weekends and requires notification prior to the last break on weekdays); and for the notice required for union business (five days notice required in St. Cloud, no notice required in Crookston). The fact that the parties were bargaining for an initial contract weighs in favor of determining that a reasonable period of time had not elapsed at the time of the petition.

Moreover, the Board is reluctant to negate the parties' good-faith bargaining for an initial contract when their efforts are "on the verge of reaching finality." Ford Center, 328 NLRB at 2. On March 31, two weeks prior to the filing of the decertification petition in this case, the parties had reached complete agreement on all of the terms of a collective bargaining agreement, had reduced that agreement to writing and had signed it. All that remained – as the parties had expressly agreed – was ratification of the agreement by the Union's membership. Thus, as of March 31, the collective bargaining process was "on the verge of reaching finality." The ratification procedure began the

day before and continued the day after the filing of the petition. The agreement was in fact ratified by the membership and the Employer implemented the terms of the agreement.

In light of the foregoing, I find that, "in balancing the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships," the purposes of the Act are best effectuated by finding that a reasonable time for bargaining had not passed at the time of the filing of the petition and, therefore, that the petition should be dismissed. MGM Grand Hotel, 329 NLRB at 467.[6] To conclude otherwise "would be to ignore completely the fruitful negotiations" engaged in by the parties, and the tentative agreement they reached, prior to the filing of the decertification petition. N.J. McDonald & Sons, 155 NLRB at 71.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it is, dismissed.[7]

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6 Both former Chairman Hurtgen and former Member Brame dissented in MGM Grand Hotel but in doing so made it clear that in deciding recognition bar cases they too placed great weight on whether the parties had reached, or were on the verge of reaching, agreement at the time the petition was filed. See MGM Grand Hotel, 329 NLRB at 468, n.1 (Chairman Hurtgen dissenting) and 329 NLRB at 472 (Member Brame dissenting). Thus, my decision in this respect is controlled by the majority decision and consistent with the dissenting opinions in MGM Grand Hotel.

7 Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision must be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street N.W., Washington, DC 20570. The request must be received by the Board in Washington by **May 29, 2003.**

Signed at Minneapolis, Minnesota, this 15th day of May, 2003.

/s/ Ronald M. Sharp

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